# No. 22,244

# United States Court of Appeals

## For the Ninth Circuit



GEORGE L. SMITH,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

## BRIEF FOR APPELLEE

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# United States Court of Appeals

## For the Ninth Circuit

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GEORGE L. SMITH,
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## BRIEF FOR APPELLEE

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### JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Eastern District of California entered on February 27, 1967, in favor of the appellee, United States of America.

Jurisdiction in the District Court was based upon the Federal Tort Claims Act (Title 28 U.S.C. § 1346(b) *et seq.*). Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1291.

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### STATEMENT OF THE CASE

Appellant George L. Smith was among 1,056 naval aviators selected in 1940 as subjects for a medical study. The study was followed up in 1952, 1957 and

1963, and appellant took part in the study as a volunteer, although he was no longer in the service and was under no compulsion of any kind to do so.[1]

On May 21, 1963, appellant was in Pensacola, Florida, for the express purpose of taking continuing tests in the so-called Thousand Aviator Study described above.[2] One of the tests was the Graybiel-Fregly Posture Test, ". . . a baseline study of balance as a function, or as it changes, in aging."[3] There were several different stages of the posture test, the first of which was to stand on the floor for one minute with eyes closed, hands across chest and feet in a heel-to-toe position.[4] Appellant was given a perfect score on this part.[5] He was then instructed, orally and in writing, to walk as far as he could along a ¾ inch wide metal rail with a sandblasted top surface lying 2 and ½ inches above the floor.[6] He was to keep his eyes open, cross his hands over his chest and walk in a heel-to-toe, tandem fashion. He was told that he would have five trials and that he would be scored on the best three of the five trials since he could be expected to lose his balance at least two out of the five times.[7] Appellant proceeded to take his first trial, lost his balance and stepped off the rail.[8]

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[1]Reporter's Transcript, pp. 7, 25, 27, and 49-50.
[2]*Id.*, p. 10.
[3]*Id.*, p. 48.
[4]*Id.*, pp. 55-60.
[5]*Id.*, p. 67.
[6]*Id.*, pp. 72-73.
[7]*Id.*, p. 131.
[8]*Id.*, p. 109.

On the second attempt, appellant lost his balance again and then fell, in a manner that he was unable to establish in the trial below, thereby injuring himself.[9] After receiving inquiries and assistance from Dr. Fregly and the aide who had explained the test to him, appellant insisted on going ahead with the test and completed it.[10] At no time did appellant resist taking the rail test, before or after the fall, although he could have withdrawn from it at any time, as other volunteers had occasionally done.[11]

At least 740 people of many ages and capacities had taken the same test before May 21, 1963, without falling.[12]

On March 22, 1965, appellant filed a complaint for damages in the amount of $204,162 plus costs, and on February 27, 1967, judgment was entered against the appellant. Appellant's motion for a new trial was denied on April 24, 1967. Appellant now appeals from said judgment and from the order denying motion for new trial.

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[9] *Id.*, pp. 65-66.
[10] *Id.*, pp. 66-67.
[11] *Id.*, p. 50.
[12] *Id.*, pp. 74, 83.

## ARGUMENT

### (1) THE DISTRICT COURT'S FINDING THAT APPELLEE WAS NOT NEGLIGENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The substantive law of the State of Florida, where the accident occurred, is controlling in this case (Title 28 U.S.C. § 1346(b)). Under Florida law, the United States in this case owed appellant the same duty that any businessman owes his invitee: to warn him of any latent or concealed dangers on the premises. *Hall v. Holland* (Fla. Sup. Ct. 1950) 47 So.2d 889; *Andrews v. Goetz* (Fla. Sup. Ct. 1958) 104 So.2d 653. The invitor need not warn his invitee of obvious hazards nor of conceivably dangerous possibilities that a prudent person exercising due care would, on his own initiative, observe, comprehend and avoid. *Matson v. Tip-Top Grocery Co. Inc.,* 151 Fla. 247, 9 So.2d 366 (1942); *Crosier v. Joseph Abraham Ford Company* (Dist. Ct. Fla. 1963) 150 So.2d 723.

In this instance appellant had willingly agreed to take a series of tests. The nature and purpose of any test is that some will pass and some will fail—that some will do better than others. And the very nature and purpose of this particular test was that some of the volunteers would better maintain their balance while walking on the rail than others. Had a certain percentage of the subjects not lost their balance, the test would have had no meaning. Appellant must be charged with the obvious, even anticipated, possibilities of the situation, especially since he must have known it would be harder to maintain his balance

with his arms against his chest and his feet in a tandem, heel-to-toe position.

But aside from the self-evident aspects of the test, two additional circumstances make the case all the stronger for appellee. One is the fact that appellant was specifically told that he was taking a balancing test and that he would be scored only on the best three of five attempts. In effect, then, appellant was *told* that he would not be able to walk the full length of the rail in his first three attempts, even if appellant had not already figured that out for himself.[13]

The second factor militating against the claim of appellee's negligence is that appellant had already taken two stages of the equilibrium test before he fell. The first consisted of standing with eyes closed and feet in tandem position for sixty seconds. The second was appellant's *first trial* of the rail-walking test, when he presumably stepped from the rail without falling, as hundreds had done before him. Appellant should not only have *foreseen* the likelihood of losing his balance; not only was he *told* that he *would* lose his balance; he had, in fact, *experienced* it on the first trial, thereby removing from appellant's mind any mystery that might have shrouded the test before he took it. Having lost his balance once and taken the obvious precaution of stepping off the rail rather than letting himself fall, appellant should have been all the more prepared to do so on the second trial.

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[13] *Id.*, p. 131.

In view, therefore, of what he should have known by looking at the test situation, what he was in fact told about the test situation and what he actually experienced on his first attempt to walk the rail, appellant must be presumed to have been aware of the possible consequences of his taking the test. An ordinarily prudent person would, if anything, be especially alert and inquisitive in a new, experimental situation. Appellant's case is not that of the unwary painter falling from his invitor's defective awning that was seemingly safe to stand on (*Hall v. Holland, supra,* cited in Brief for Appellant, pages 11, 12 and 16). Nor is it the case of a ship chandler's customer falling into an unguarded and unmarked hole in a dark storeroom (*Christopher v. Russell,* 62 Fla. 189, 58 So. 45 (1912), cited in Brief for Appellant, page 16). If anything, appellant's case is analogous to that of the woman in *Matson, supra,* who turned and stepped directly from a lunch-counter stool to the floor, which was twelve and three quarter inches below the level of the platform edge on which the stool was mounted. In holding against the invitee, the Florida Supreme Court said at page 368 of the Southern Reporter:

> "The law does not require a proprietor of a public place to maintain his premises in such condition that an accident could not possibly happen to a customer. Plaintiff in turn was obligated to exercise a reasonable degree of care for her own safety . . . there is no duty to warn of an obvious condition which is not in itself dangerous."

Another opinion more applicable to appellant than the *Hall* and *Christopher* cases he cites is that of *Earley v. Morrison Cafeteria Co. of Orlando* (Fla. Sup. Ct. 1952) 61 So.2d 477, in which a plaintiff tripped over a one-half inch thick mat lying on a cafeteria floor. Agreeing that the mat may not have been easy to see, the court nevertheless stated at page 478 of the cited opinion that ". . . the proprietor has a right to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses."

Not only did the test situation not contain latent or concealed peril, but it was not essentially dangerous at all. While it was inherent in the test that the subjects would often lose their balance, the probability of those subjects falling *after* they had lost their balance was not. The record shows that at least 740 persons had taken the test without falling: they had simply stepped off the rail on one side or another when they discovered they could walk no further, just as appellant had discovered on his first trial.

Appellant attributes great significance to the statistical results of the Graybiel-Fregly Test and theorizes from those results that appellant ran a much greater risk of falling than a younger man.[14]

But appellant's conclusions in this respect are unwarranted on two counts. First, the test results are statistical and have importance only in terms of aver-

[14]Brief for Appellant, pp. 14-18.

age group performance. As the trial judge noted,[15] the results cannot be applied to appellant as an individual and have nothing to do with appellant's own balancing skills, which could easily be greater or less than the norm. Second, one of the originators of the test, Dr. Fregly, testified at the trial that the difference between the capabilities of 17 to 42 year old men and men aged 43 to 50 with specific regard to the rail-walking phase of the test was relatively insignificant.[16] And the test results say nothing at all about the propensities of the test subjects to fall after losing their balance. Even in terms of the test itself, then, appellant's argument that there were special dangers in the test for appellant because of his age are patently unwarranted. Dr. Fregly's practical observation of the fact that hundreds of subjects of all ages and skills had walked the rail without falling is far more relevant to the resolution of this case than are the statistical results of the entire Graybiel-Fregly Posture Test.

In summary, therefore, appellee contends that it was not required under Florida law to protect appellant against all imaginable hazards that might arise in the test. Appellee's duty extended only to latent or concealed dangers, and there were no such dangers in this instance and very little danger at all in the usual sense of the word. All life is a danger if the definition is stretched far enough, but the law of

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[15]Reporter's Transcript, p. 113.

[16]*Id.*, p. 85.

Florida imposes a far more precise and limited standard on invitors, and appellee clearly fulfilled that standard with respect to Mr. Smith.

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**(2) IF THERE WAS ANY RISK IN THE TEST, APPELLANT ASSUMED SUCH RISK AS A MATTER OF LAW.**

Appellant volunteered to travel to Pensacola for the tests; he was under no compulsion to do so, particularly since he received no compensation for his services other than out-of-pocket expenses. Once in Florida, he could have withdrawn from the tests at any time, and no one could have kept him there. Appellant could also have withdrawn at the point when he stood in the test room and faced the rail on May 21, 1963, and he could have refused to take the second trial walk along the rail after failing to complete the distance in his first trial.

In reality, however, the record clearly shows that appellant cooperated with the testing personnel and apparently showed no reluctance whatsoever in taking the phase of the test in which he fell. Appellant was so cooperative and willing, in fact, that he continued with the tests even after he fell.[17]

If there was any risk in this case, it was that the test subject would step off the rail so carelessly as to lose his footing on the wooden floor and fall. Such a risk was self-evident and Florida follows the general rule that an injured party must be held to be

[17] *Id.*, p. 67.

aware of an obvious risk even if the party had no actual knowledge of it. *Crosier v. Joseph Abraham Ford Company, supra.* Regardless of whether or not appellant actually knew, then, that he might fall when he stepped off the rail, he must be presumed to have known of the possibility and to have assumed that risk.

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**(3) IF APPELLEE WAS NEGLIGENT, APPELLANT WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW IN FAILING TO STEP OFF THE RAIL CAUTIOUSLY ENOUGH TO PREVENT HIMSELF FROM FALLING.**

In the Florida Supreme Court case of *Tutwiler v. Beverly Nalle, Inc., et al.,* 152 Fla. 479, 12 So.2d 163 (1943), a prospective lessee of a building opened a cellar door and fell down a flight of stairs while inspecting the premises. Although the cellar steps were unmarked and unlighted, the court said that "The failure of the appellant to exercise ordinary care for her own safety when inspecting the property by opening a closed door and taking a step forward into a dark and unlighted stairway, thereby constributing to her own injury, as a matter of law, will preclude a recovery on her part . . ."[18]

In this instance, appellant failed to exercise the ordinary care that hundreds of people exercised before him when they stepped off the rail. As a result he fell and suffered an unfortunate accident for which appellee should not be held responsible. Addi-

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[18]12 So.2d at p. 164.

tional Florida cases denying recovery in factually similar cases involving contributory negligence are: *Bowles v. Elkes Pontiac Co.* (Fla. Sup. Ct. 1953) 63 So.2d 769, and *Andrews v. Goetz, supra.*

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**(4) THE TRIAL JUDGE DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL WHEN, IN HIS OPINION, ALLEGEDLY NEW EVIDENCE OFFERED BY APPELLANT COULD HAVE BEEN DISCOVERED PRIOR TO THE ORIGINAL TRIAL AND WHEN SUCH EVIDENCE WOULD NOT IN ANY EVENT HAVE ALTERED HIS DECISION IN THE CASE.**

Appellant moved for a new trial on the grounds that new testimony affecting appellant's case could be produced. The District Court concluded (1) that the purportedly new evidence could have been made available for the trial and (2) that had such evidence been produced, it would not have materially influenced the court's decision. The trial judge was properly acting within the broad discretion given him with respect to motions for new trial, and his action in denying the motion for new trial cannot be considered reversible error. "As the motion for new trial is addressed to the discretion of the trial court, . . . its ruling on such motion is not subject to reversal unless its order was made under the compulsion of a mistake of law, or it failed to exercise its discretion, or abused its discretion. . . ." (Footnotes omitted.) 6A Moore's *Federal Practice,* page 3773.

## CONCLUSION

The question of whether appellee was negligent in its duties as a business invitor was a question of fact for the District Court to resolve. We submit that there is substantial evidence to support the court's decision in that regard. The evidence did not establish the existence of any latent or concealed dangers on the premises or in the situation in which appellant took the balancing test. Moreover, we submit that as a matter of law appellant assumed whatever risk was inherent in the test because the possible consequences of the test were self-evident and because appellant voluntarily took the test.

It was not error for the trial judge to deny appellant's motion for new trial when, in that judge's opinion, the evidence could not only have been produced in the trial but was insufficiently new or significant to change the result of the original trial.

We therefore submit that the judgment of the District Court should be affirmed.

Dated, Sacramento, California,
May 20, 1968.

Respectfully submitted,

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JAMES H. DAFFER,
Assistant United States Attorney,
*Attorneys for Appellee*
*United States of America.*

## Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

James H. Daffer,
Assistant United States Attorney.

# No. 22,244

IN THE

# United States Court of Appeals

## For the Ninth Circuit



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GEORGE L. SMITH,
*Appellant,*

vs.

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## REPLY BRIEF FOR APPELLANT

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IN THE

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## For the Ninth Circuit

GEORGE L. SMITH,
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## REPLY BRIEF FOR APPELLANT

### INTRODUCTION

As seen from the Brief for Appellee, the parties herein are in accord in the point that the District Court had appropriate jurisdiction of this suit based on the Federal Tort Claims Act (Title 28, *U.S.C.,* Section 1346(b), and Sections 2671, et seq.). The parties also agree that this court has appellate jurisdiction under 28 *U.S.C.,* Section 1291.

However, several discrepancies appear in the appellee's recitation of the facts, beginning on page 2 of the Brief for the Appellee, under the heading "Statement of the Case" as follows:

1. On page 2 of Brief for Appellee, it is stated that the plaintiff ". . . was then instructed, orally and

in *writing* . . ." with regard to body positions and all other instructions relating to the tests in the Greybial-Fregley Test Battery. In support of this, appellee cites pages 72 and 73 of the Reporter's Transcript. These pages contain the testimony of Dr. Alfred R. Fregley, in which he states that written instructions were given to all testees before taking the test. However, there is no statement that plaintiff himself had received written instructions. Plaintiff in fact stated (R.T. 14) that the instructions were given to him verbally, and then later he stated that he did not recall ever having received or seen written instructions and that his memory was not refreshed by seeing a sample copy of said written instructions (R.T. 30-31).

This point, then, is in reality a question of fact in contention which was never specifically decided by the court and which appellee is not entitled to assume from the conflicting evidence. As a matter of fact, Joseph F. Sardoni, in his affidavit submitted to the court as partial grounds for a new trial, stated that he did not recall being handed any written instructions for this test (T.R. 73), and George Thomasini stated in a similar affidavit that "*oral* instructions were given."

2. The second fallacious assumption made in appellee's brief was that the plaintiff was told that he could be expected to lose his balance at least two out of the five times he took the test. For authority, appellee refers to page 131 of the Reporter's Transcript. There is no statement therein or anywhere else in plaintiff's testimony that he knew he would

lose his balance in two of the tests. The statements recorded there are simply an example of the court prompting Dr. Fregley by a series of leading questions to make *assumptions* about what Mr. Smith knew or did not know. There is no showing that defendant had or should have had any such knowledge, and from the facts in the record, appellee can neither assume that any such finding was made, nor can appellee assume that plaintiff had such knowledge. As a matter of fact, all that this testimony proves is that the *doctor himself knew* that a testee could be expected to lose his balance at least two out of the five times, and therefore, he and perforce, the government, had even a greater responsibility for the safety of his testees, which duty for safety was ignored and breached resulting in the injury to plaintiff.

3. Appellee then states on page 2 of his brief that the appellant proceeded to take his first trial, lost his balance, and stepped off the rail, citing as authority therefor, page 109 of the Reporter's Transcript. There is no statement nor inference on that page that plaintiff lost his balance and stepped off the rail on his first attempt to take this test. This is merely another example of appellee trying to assume facts with no testimonial basis, and for which no foundational basis had been laid.

4. Referring then to page 3 of appellee's brief, appellee states that the plaintiff was unable to establish in the trial below the manner in which he fell, and cites as authority therefor pages 65 and 66 of the

Reporter's Transcript. However, both of those pages report the testimony of Dr. Fregley as being examined by Mr. Shubb, and there is no statement therein by the plaintiff concerning the manner in which he fell or his ability or inability to describe it, nor did the court make any such findings as to circumstances surrounding this fall.

5. Appellee then further misstates the facts by a statement that plaintiff "insisted on going ahead with the test and completed it . . . ," citing as evidence therefor pages 66 and 67. However, a true statement, as reported in the record, is not that plaintiff in fact insisted on continuing, but that the doctor remembers that he said "that there was nothing here to prevent him from continuing the test, and he did so."

6. As a final example of appellee's misconstruing of the facts as reflected in the record, on page 3 of appellee's brief, appellee recites as a fact that 740 people took the test without falling, and cites as authority therefor page 74 and page 83 of the Reporter's Transcript. There is no such statement on either page 74 or page 83 that no one else of that 740 people had fallen. However, on page 75, Dr. Fregley does state that no one *to his knowledge* had ever fallen. The court made no finding of fact on this and it is improper for the appellee to assume and use this as authority for the unfounded premise that no one else had fallen, since the fact that the doctor did not *know* of anyone else falling does not establish that no one else actually fell.

## ARGUMENT

In appellee's argument, beginning on page 4 of his brief, appellee correctly states the nature and purpose of the particular tests involved in this case and correctly states that by their very nature, the tests required that some people should fall. Appellee also correctly states the Florida law with relation to the obligation that an invitor has to an invitee. However, what appellee neglects to interject in this argument is the fact that appellant, in coming to the appellee for these tests, had put himself under the control of and in the hands of a person in superior knowledge of the intrinsic dangers of this test on the basic understanding that the person in control would not put him in any danger without prior warning. Dr. Fregley had designed this test, knew what its purposes, aims and functions were for, and had administered the test at least 740 times before. Plaintiff, on the other hand, had no information regarding the tests, had taken other tests on prior occasions and never been subjected to this particular test, and had no way of knowing the intrinsic dangers of the test as did Dr. Fregley. Thus arose the doctor's duty toward the testee (as stated with more particularity in appellant's brief), which duty was breached in the failure to take precautions necessary as outlined in appellant's opening brief. In addition to this, the *doctor knew* that the *plaintiff did not know* of the dangers. The plaintiff was entitled to rely upon the judgment of the doctor, since it is only natural for a person to rely on a doctor for guidance, especially

in areas affecting his personal physical safety and well being with relation to which a person has not had any experience or understanding.

Therefore, under the Florida law, the defendant-appellee is liable for negligence as a matter of law since there were latent or concealed dangers inherent in the test, as to which only the defendant and its agents had knowledge. The doctor, and thereby the defendant, breached this duty by not making an active, outright warning to the plaintiff and by not taking precautions against the injuries which could foreseeably result therefrom. By this breach of duty, the plaintiff was proximately and directly injured and has suffered damages therefrom, which damages he is now entitled to recover from the defendant.

On page 5, appellee's argument fails as a *non sequitur* based on proper deductions from an improper statement of facts on pages 2 and 3 of its brief. At no place in the transcript is there testimony which indicates that appellant was told that he would not be able to walk the full length of the rail in his first three attempts. The *non sequitur* results from deducing, or attempting to deduce, that the mere fact that plaintiff would be scored on three out of five tries would imply that he was told he would fail at least two times. In fact, all this implies is that it is possible to do it three times in a row without any misses, but that if something goes wrong a testee would be given two extra chances. Appellee again refers in the next paragraphs to plaintiff being *told*

that he would lose his balance, again a misstatement of the facts, and an erroneous, fallacious assumption.

On page 8 of its reply brief, appellee states that the age group performance results cannot be applied to the appellant as an individual and have nothing to do with the appellant's own balancing skills. Even if the above were correct statements of the facts, the appellee cannot deny that this knowledge must be attributed to the *doctor* and must raise in him a greater duty with relation to people in this age group, since he knows that the possibility is greater for people in that group to have less balancing ability or skill. His duty thus being greater, his breach is obviated even more.

In the concluding paragraph on pages 8 and 9 of appellee's brief it is contended that an invitor does not have a duty to guard an invitee from all imaginable hazards. It has never been appellant's contention that the defendant has to protect invitees against *any imaginable* hazards, let alone *all* imaginable hazards. However, it is the law in that state that *real* dangers must be protected against. Here the danger is real, as is seen from the fact that the accident happened. The hazard was hidden, known only to the doctor, and the plaintiff was in a situation wherein he had every right to rely on the judgment, care and watchfulness of the doctor for his protection, and therefore, was not put on notice that there was any danger by any of the subtle, extraneous facts surrounding him. The doctor, knowing these facts and

dangers, and ignoring them by not taking any steps to prevent the falls or to to prevent injury if a fall should occur, breached his duty, and in so breaching it, proximately caused the injury to plaintiff for which damages are herein being claimed.

With relation to the cases cited by appellee as being analogous to this case and upon which appellee predicates nonliability (*Matson v. Tip-Top Grocery Co., Inc.* (1943), 151 Fla. 247, 9 So.2d 366, cited by appellee at pages 4 and 6; *Farley v. Morrison Cafeteria Co. of Orlando* (Fla.Sup.Ct. 1952), 61 So.2d 477 cited by appellee at page 7, both of these cases are distinguishable from this case on an obvious and intrinsic ground. In those cases, the invitor had no greater duty imposed upon him by the relation of the parties or by his superior knowledge. In both cases the hazards which caused the injuries were open, obvious and avoidable by a person exercising normal care.

In this case, however, defendant's agents had a greater degree of care and responsibility since they had knowledge of the dangers of the tests to which plaintiff had no access. Plaintiff had placed himself at the disposal of defendant's agents for purposes of these tests. He had found from past experience that he would be well taken care of and had no reason to believe that precautions were any less stringent at the stage of testing in which he was injured.

In addition to knowledge of the hazards intrinsic in these tests, defendant's agents knew that plaintiff did not and *could* not know of them, because he had

no predictable knowledge of their design or purpose and had never taken them before. Defendant's agents should then have been placed on their guard and should have exercised even greater precautions in administering this test, all of which they failed to do.

Plaintiff did, and justifiably so, rely on defendant's agents to properly protect him to keep him from endangering himself and thereby subjected himself to the tests which he was requested to take.

Because of these dangers of which he had no warning and because of the failure to supply protective and preventive devices, plaintiff fell and was injured. These injuries and the damages sustained therefrom were the proximate and direct result of the negligence of the defendant's agents as outlined above and in appellee's brief. On this basis, defendant is, and should be found, negligent as a matter of law.

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**PARTS II AND III OF APPELLEE'S ARGUMENT**

All of appellee's arguments and contentions relating to assumption of risk and contributory negligence in appellee's brief are irrelevant, immaterial, and superfluous and should be stricken therefrom. The court, in its findings of facts and conclusions of law, made no ruling with relation to either assumption of risk or contributory negligence. The court simply found that the plaintiff had failed to carry his burden in establishing the negligence of the defendant or any of its agents, servants or employees. Since no

finding was made by that court as to these two points, there is no basis for raising them on appeal, and therefore, all arguments relating to them are not only without merit, but cannot be considered here.

Therefore, the only issue to be determined and which may be argued is that of the negligence of the defendant, which under the facts, must be found as a matter of law.

Dated, Sacramento, California,
June 4, 1968.

Respectfully submitted,
PEASE, MAYHEW & KASSIS,
By JAMES E. KASSIS,
*Attorneys for Appellant.*

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES E. KASSIS,
*Attorney for Appellant.*